UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RICHARD T. LEONARD, Appellant, v. DEPARTMENT OF DEFENSE, Agency.	DOCKET NUMBER PH-0432-98-0303-I-1 DATE: JUN 24 1999

John A. Gillespie, Esquire, Red Bank, New Jersey, for the appellant.

Ralph G. Matheson, Jr., Esquire, Fort Lee, Virginia, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 The appellant petitions for review of the initial decision that sustained the agency's removal action. We GRANT his petition and for the reasons set forth below, REVERSE the agency's removal action.

BACKGROUND

¶2 Effective April 21, 1998, the agency removed the appellant from his WG-6 Meat Department Manager position for unacceptable performance in critical subelements 1a (meat operations) and 2d (quality of service) of his performance standards. Initial Appeal File (IAF), Tab 3, Subtabs 4b, 4e, 4i. Following a hearing, the administrative judge affirmed the appellant's removal. He first noted

the appellant's stipulation to the Office of Personnel Management's approval of the agency's performance appraisal plan and to his receipt of notice of the performance standards and critical elements therein for his position under both the civilian performance plan and the performance improvement plan (PIP). Initial Decision (ID) at 4. Further, he noted that the removal was properly based on unacceptable performance in one subelement of each of two critical elements and that the appellant had not claimed that he was unaware that unsatisfactory performance in those subelements constituted unacceptable performance in the whole critical element. ID at 6.

¶3 Regarding the appellant's performance, the administrative judge found that the agency's charge as to critical subelement 1a could not be sustained since the record showed that the meat department had been out of tolerance for the period claimed not because of the appellant but due to accounting deficiencies and because meat product sales were being credited to grocery sales. ID at 8-10. The administrative judge sustained, however, the agency's charge as to critical subelement 2d. ID at 10-13.

¶4 The appellant has timely filed a petition for review of the initial decision, reasserting, *inter alia*, his argument made below that his performance under critical subelement 2d during the PIP period did not warrant his removal. Petition for Review File (PFRF), Tab 1. The agency has timely responded in opposition to the petition but has not filed a cross petition concerning critical subelement 1a. PFRF, Tab 3.

ANALYSIS

¶5 Under 5 C.F.R. § 1201.56(b), substantial evidence is defined as "that degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree." As applied in Board cases, this means that the agency is not required to provide evidence regarding the appellant's performance that is

more persuasive than that presented by the appellant. *See Shuman v. Department of the Treasury*, 23 M.S.P.R. 620, 624 (1984).

¶6 To sustain a Chapter 43 removal action, an agency must show by substantial evidence that the appellant's performance was unacceptable in at least one critical element. *Luscri v. Department of the Army*, 39 M.S.P.R. 482, 490, *aff'd*, 887 F.2d 1094 (Fed. Cir. 1989) (Table). Where an employee is removed on the basis of fewer than all the components of a performance standard for a critical performance element, the agency must present substantial evidence that the employee's performance warranted an unacceptable rating on the performance element as a whole. *Mendez v. Department of the Air Force*, 62 M.S.P.R. 579, 583 (1994). If the PIP performance is unacceptable, an agency may rely on instances of unacceptable performance in the same elements cited in the PIP, provided that those instances occurred within the one-year period before the notice of proposed action was issued. *Brown v. Veterans Administration*, 44 M.S.P.R. 635, 642-43 (1990).

¶7 The issue presented here is whether the agency established by substantial evidence that the appellant's PIP performance was deficient under critical subelement 2d of his performance standards. We find that the agency failed to meet this burden of proof. The record shows that the agency placed the appellant on a PIP from October 16, 1997 through January 19, 1998. IAF, Tab 3, Subtabs 4h, 4g. The PIP incorporated the standard set forth in the performance plan for quality of service – (2d) "No more than two occurrences per month of a stock availability rate below 98%, as determined by weekly stock availability reports." IAF, Tab 3, Subtab 4h at 2. On February 10, 1998, the agency issued the appellant a Mid Year Review/Final Evaluation On Status of Performance Improvement Plan, which assessed his performance in critical subelement 2d during the pre-PIP and PIP period as being unacceptable. IAF, Tab 3, Subtab 4f.

¶8 Specifically, the agency charged that in 1997 the quality of service in the meat department was lacking because "[o]n July 3, Aug 17, 20, 26, September 2, 9, 14, 21 and Nov 23, meat selections were less than what is described in DeCAD 40-3 Meat Operations." *Id*. The agency's February 24, 1998 removal proposal notice relied on, *inter alia*, these same alleged instances of stock availability deficiencies. IAF, Tab 3, Subtab 4e. The agency's removal notice, without specifying the dates, charged the appellant with having admitted in his written reply that from July 1997 through January 1998 the fresh meat selection was not full and in some instances as low as 50% less than the mandatory requirement stated in DeCAD 40-3; Chap 2-1. IAF, Tab 3, Subtab 4c. The administrative judge sustained the charge as to critical element 2d, relying on memoranda allegedly documenting the appellant's failure to maintain the requisite 98% stock availability rate prior to and during the PIP period; supervisors' testimony to this effect; and the appellant's defense that the stock deficiencies were caused by staff shortages. ID at 11-13.

¶9 We are at a loss, however, as to what evidence in this record supports a finding that the appellant failed to achieve the requisite stock availability rate or satisfy DeCAD 40-3, Chapter 2-1, during the PIP period. We know from the appellant's submission of DeCAD 40-3, Chapter 2-1, that the regulation requires that various meats be stocked daily in the meat department in specified minimum assortments. IAF, Tab 9. Unlike the other eight charged pre-PIP deficiencies, which, as the administrative judge correctly points out, documented the appellant's nonconformity with this regulation and which the appellant acknowledged, the record is void of any contemporaneous documentation that he again failed to satisfy this regulation on November 23 as charged. Indeed, when the agency issued the appellant a progress report on December 5, 1997, during the PIP period, it did not mention any alleged November 23 stock availability deficiency. IAF, Tab 3, Subtab 4f.

¶10 Further, contrary to the administrative judge's finding, the agency failed to present any relevant evidence at the hearing of this PIP deficiency. In fact, the hearing tape discloses that all of the testimony went to either critical element 1a or the pre-PIP stock availability deficiencies charged against the appellant, and his defense that staff shortages were to blame. Hearing Tapes, 1 and 2. Contrary to the administrative judge's finding, at no time did the appellant admit below that he had completely failed to satisfy regulation DeCAD 40-3, Chapter 2-1 on November 23 or at any other time during the PIP period. While the agency found such an admission in the appellant's reply, we do not agree. Our reading of the appellant's reply discloses that he mentioned the November 23 date once, indicating as he had with some of the charged pre-PIP deficiencies, that there had been a high volume of sales in the meat department on that date. IAF, Tab 3, Subtab 4d at 6. This statement hardly equates to a blanket admission that stock availability was as low as 50% on November 23.

¶11 Moreover, the agency simply failed to cite two instances on November 23 or any other month during the PIP period, wherein the appellant permitted a stock availability rate of less than 98% in the meat department. As such, the agency's proof of its charge under critical subelement 2d clearly does not rise even to the level of substantial evidence. Accordingly, absent such evidentiary support for the charge, and absent a claim of error as to subelement 1a, we must reverse both the initial decision on this point and the agency's removal action.

ORDER

¶12 We ORDER the agency to cancel the appellant's removal and to restore the appellant effective April 21, 1998. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶13 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel

Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶14 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and of the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶15 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision on this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶16 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The

regulations may be found at 5 C.F.R. § 1201.202. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management,* 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in

Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law as well as review other related material at our web site, www.mspb.gov.

FOR THE BOARD: _____

Robert E. Taylor
Clerk of the Board

Washington, D.C.